(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAY 2 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology (IT) software development company. It seeks to employ the beneficiary permanently in the United States as a senior system analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a Master's degree in an IT related field or in the alternate field such as computer science, engineering, MBA[1] or related field.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

On Form I-290B, Notice of Appeal or Motion, counsel stated that the director erred and abused his discretion in denying the petitioner's Form I-140 petition. Counsel also stated that the petitioner would submit its arguments within 30 days of the filing of the appeal. As of the date of this decision, no additional evidence is received by the AAO; and therefore, the record is considered complete. We note that counsel provides no specifics regarding how the director erred and abused his discretion in denying the instant petition. We note that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988);

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[1] Even though the petitioner has not clarified what "MBA" stands for we will assume that the petitioner intended "MBA" to represent a Master's in Business Administration.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Nevertheless, the AAO will consider the appeal and discuss the merits of the case.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification, was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on August 15, 2011.[3] The Immigrant Petition for Alien Worker (Form I-140) was filed on March 10, 2012.

The proffered wage as stated on the Form ETA 9089 is $82,514 per year. The priority date in this case is August 15, 2011. The record before the director closed on July 10, 2012 with the receipt of the petitioner's response to the director's request for evidence (RFE). As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, 2011 is the relevant year. In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The beneficiary's Internal Revenue Service (IRS) Form W-2 for 2011 indicates that the petitioner paid the beneficiary $97,516.80, which is above the proffered wage of $82,514. Therefore, the petitioner has met its burden of proof that it has the ability the pay the proffered wage as of the priority date.

The AAO will next discuss whether the beneficiary had the qualification stated on the labor certification on the priority date. At the outset, however, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

[3] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[4] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

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[4] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* revisited this issue in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984), stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). (*See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On the ETA Form 9089, the "job offer" position description for a medical and clinical laboratory technologist provides:

> Advanced analysis of client business processes and functional requirements; web site architecture design; Development of Database-driven web applications to support dynamic content and integration to back-end systems using multi-tiered approach; Development and maintenance of interface, and development of web site tools; Develop logic multi and code; execute installation tasks for web pages and web application software modules; and Perform software testing and oversee debugging and documentation. Must be willing to travel and set up various systems perform feasibility studies, interact with clients [*sic*] and train various users at different locations for different short term and long term projects. Responsible for managing and implementing[ ]requirements specified. Work with technologies such as Java; JSP, HTML[,] *Net, C#, C, C++, Window, Linux etc.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: "Master's."

H.4-B. Major Field Study: "IT Related"

H.6. Is experience in the job offered required for the job?

The petitioner checked "no."

H.7. Is there an alternate field of study that is acceptable?

The petitioner checked "yes" to this question.

H.7A. If yes, specify the major field of study:

The petitioner stated, "Computer Science, Engineering, MBA or Related."

H.8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

H.9. Is a foreign educational equivalent acceptable?

The petitioner checked "yes" that a foreign educational equivalent would be accepted.

H.10. Is experience in an alternative occupation acceptable?

The petitioner checked "no" to this question.

H.14. Specify skills or other requirement.

The petitioner stated, "Work with technologies such as Java; JSP, HTML, Window, Linux, .Net, C#, C, C++ etc."

On the ETA Form 9089, signed by the beneficiary on January 14, 2012, she indicated that the highest level of achieved education related to the requested occupation was a master's degree in science. She listed the institution of study where that education was obtained as in Tennessee, and the year completed as 2006. In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma from which indicates that the beneficiary was awarded a Master of Science degree. Further, the transcript from indicates her major as biology.

The record also contains copies of the beneficiary's Master of Science degree from India, awarded in May 2004 with a major in Microbiology; and a Bachelor of Science degree awarded in December 2001 from India, with course work in English, Sanskrit, Botany, Chemistry, and Microbiology. However, the record contains no educational equivalency evaluation prepared by a qualified evaluation service or in accordance with 8 CFR § 214.2(h)(4)(iii)(D)[5] to reflect the U.S. equivalency of these degrees. In the record also is a copy of a certificate from in New Jersey, indicating that the beneficiary has completed SAS Training Program in 2007.

The director denied the petition on July 30, 2012, concluding that the beneficiary's Master of Science degree was not in an IT related field or in the alternate fields of study in Computer Science, Engineering, MBA or related field. On appeal, the petitioner submits no evidence to support counsel's assertions that the director erred and abused his discretion in concluding that the beneficiary's Master of Science degree did not meet the specific requirements for the major field of study indicated on the labor certification. As stated above, without documentary evidence, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190

[5] According to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) the evaluator must be "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."

(Reg. Comm. 1972)). The petitioner stated a specific degree with specific major field of studies on the labor certification, rather than stating that it would accept a master's degree in any field. We conclude that the evidence in the record does not demonstrate that the beneficiary's master's degree in the field of biology is a field related to IT, computer science, engineering, or MBA.

The beneficiary does not meet the job requirements on the labor certification and therefore, the director's decision to deny the petition must be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.